

APR 9 1979

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No.

78-1537

NED GEORGE FORMAN,

Petitioner,

VS.

CHARLES L. WOLFF, JR., *et al.*,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT**
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*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States of America:*

Petitioner, Ned George Forman, respectfully prays
that a Writ of Certiorari issue to review the judgment and
opinion of the United States Court of Appeals for the
Ninth Circuit entered in this proceeding on November 20,
1978.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit, not yet reported, appears as an appendix hereto. No opinion was rendered by the District Court for the District of Nevada.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 20, 1978. A timely petition for rehearing *en banc* was denied on January 8, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a state court's reliance upon a new rule of law to reverse an order granting habeas corpus relief violate the due process clause because of its *ex post facto* effect?

STATUTORY PROVISIONS INVOLVED

Nevada Revised Statutes:

“§ 453.321: Offenses and penalties: Prohibited Acts; Penalties.

“1. Except as authorized by the provisions of NRS 453.011 to 453.551, inclusive, it is unlawful for any person to sell, exchange, barter, supply

or give away a controlled or counterfeit substance.

“2. Any person 21 years of age or older who sells, exchanges, barter, supplies or gives away a controlled or counterfeit substance in violation of subsection 1 classified in:

“(a) Schedule I or II, to a person who is:

“(1) Twenty-one years of age or older shall be punished by imprisonment in the state prison for not less than 1 year nor more than 20 years and may be further punished by a fine of not more than \$5,000. . . .

“(2) Under 21 years of age shall be punished by imprisonment in the state prison for life with possibility of parole and may be further punished by a fine of not more than \$5,000. . . .

“3. Any person who is under 21 years of age and is convicted:

“(a) Of an offense otherwise punishable under subsection 2 shall be punished by imprisonment in the state prison for not less than 1 year nor more than 20 years, with possibility of probation. . . . ”

STATEMENT OF THE CASE

On April 29, 1974, in the Second Judicial District Court of the State of Nevada, Ned Forman pled guilty to

a sale of cocaine. On December 27, 1974, he was sentenced to a term of 15 years in the Nevada state prison.

On April 29, 1976, in the case of *Hass v. State*, 92 Nev. 256, 548 P.2d 1367 (1976), the Nevada Supreme Court construed the statute under which Forman had been charged. In *Hass*, the Court held that the prosecution was required to allege and to prove the age of the defendant—that the age of the defendant was an element of the offense. The absence of the allegation and proof of the defendant's age, said the Court, was a defect fatal to a conviction.

After *Hass* was decided, a petition for habeas corpus was filed on Forman's behalf in the First Judicial District Court of the State of Nevada. The argument presented in that petition was that the failure of the information to which he pled to allege his age required Forman's release. On October 15, 1976, Forman's petition for habeas corpus was granted and his unconditional release was ordered.

The State of Nevada appealed the order in Forman's case. On December 30, 1976, the Nevada Supreme Court, in the case of *State v. Wright*, 92 Nev. 734, 558 P.2d 1139 (1976), overruled *Hass*. On that same date, the Court reversed the order granting habeas corpus relief to Forman.

As a result of the Nevada Supreme Court decision in his case, the First Judicial District Court ordered Forman remanded to custody. The petition filed in the United States District Court for the District of Nevada which initiated this proceeding challenged the legality of that custody.

REASONS FOR GRANTING THE WRIT

The Reliance Upon *State v. Wright*, Which Overruled *Hass v. State*, As A Basis For The Reversal Of The Order Granting Habeas Corpus Relief To Petitioner Was In Violation Of The Due Process Clause Because Of Its *Ex Post Facto* Effect.

On October 15, 1976, when the First Judicial District Court granted Ned Forman's habeas corpus petition and discharged him from custody, the law of the State of Nevada included the requirement set forth in *Hass v. State*, 92 Nev. 256, 548 P.2d 1367 (1976). *Hass* construed Nevada Revised Statutes § 453.321, the statute pursuant to which Forman was charged, as requiring that the prosecution allege and prove that a defendant was over the age of 21 years at the time of the commission of his or her crime.

State v. Wright, 92 Nev. 734, 558 P.2d 1139 (1976), the decision of the Nevada Supreme Court which overruled *Hass* after Forman's release, should not have been relied upon by the Nevada courts to allow the reversal of the order granting habeas corpus relief to Forman. The application of *Wright* to Forman's case was an *ex post facto* application and was barred by the due process clause.

The due process clause prevents state courts from retroactively applying judicial or administrative decisions which expand the scope of criminal statutes, *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964); which increase the punishment for crimes, *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), vacated as moot, 409 U.S. 1100 (1973); or which alter rules of criminal procedure to the detriment

of a defendant, *Talavera v. Wainwright*, 468 F.2d 1013 (5th Cir. 1972). Both *Love* and *Talavera* bear upon the issues presented here.

In *Love v. Fitzharris*, a habeas corpus petition was filed by a California prisoner challenging the legality of an administrative decision postponing his minimum eligible parole date. When Love began serving his sentence, he was notified by the Department of Corrections that he would be eligible for parole after serving 3 years and 4 months. Shortly thereafter, the Department reinterpreted the California parole eligibility law and informed Love that his minimum term was 5 years.

The Ninth Circuit affirmed the District Court's order restoring Love's 3-year, 4-month term.

"A new administrative interpretation which subjects the prisoner already sentenced to a more severe punishment has the same effect as a new statute lengthening his present term [*Lindsey v. Washington, supra*] or a new court decision making what was lawful when done a crime [*Bouie v. City of Columbia*, 378 U.S. 347 . . . (1964)]; each 'alters the situation of the accused to his disadvantage . . . ' [*In re Medley*, 134 U.S. 160, 171 . . . (1890)], and each is prohibited by the Constitution."

Love v. Fitzharris, supra, 460 F.2d at 385.

See also *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir. 1977).

In *Talavera v. Wainwright*, a habeas corpus petition was filed by a Florida prisoner challenging the retroactive application of a state severance statute which increased the burden on a criminal defendant seeking a severance. On appeal from

his conviction, the Florida Supreme Court had held *Talavera* to the requirements of a new severance statute which had not been in effect at the time of his trial. That statute made it more difficult to obtain a severance than had the prior law.

The Fifth Circuit Court of Appeals held that the action of the Florida Supreme Court had denied *Talavera* due process. The Court said:

"[T]he Constitution prohibits a state from retroactively applying a new or modified law or rule in such a way that a person accused of a criminal offense suffers any significant prejudice in the presentations of his defense."

Talavera v. Wainwright, supra, 468 F.2d at 1015-16.

The Court held that

"A criminal defendant in a state criminal prosecution is denied due process of law when any of his substantive rights are disposed of by the retroactive application of a statute or rule that was not in effect at the time he sought to exercise the right."

Talavera v. Wainwright, supra, 468 F.2d at 1016.

In Ned Forman's case, the Nevada Supreme Court did what the *Love* and *Talavera* decisions held to be impermissible: It disposed of Forman's habeas corpus petition by retroactively applying a rule of law that was not in existence at the time that the First Judicial District Court ordered Forman's release. For a period of time, Nevada law provided for rules of pleading and proof in narcotics

cases that were not met in Forman's case. For a period of time, under Nevada law, Forman's imprisonment was unlawful. During that period, a Nevada court mandated Forman's release. A later court decision changing the state of the law cannot require Forman's reimprisonment.

It does not answer Forman's objections to the legality of the retroactive application of *Wright* to say that *Wright* made *Hass* a "void decision." However short-lived or ill-advised, case law and statutes have lasting effects.

"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940)
(citations omitted); *Dobbert v. Florida*,
..... U.S., 97 S. Ct. 2290, 2300 (1977).

The right to a judicially mandated release accrued to Ned Forman as a result of the Nevada Supreme Court's decision in *Hass*. His release was lawfully ordered. The Court's reconsideration of *Hass*, its determination that *Hass* was incorrectly decided, cannot erase the effect of

the *Hass* decision, one of which was the granting of a writ of habeas corpus to Ned Forman. By holding otherwise, the courts below denied Forman the due process of law guaranteed to him by the Fifth and Fourteenth Amendments.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

BURTON MARKS of

BURTON MARKS, A Professional Corporation

*Attorney for Petitioner,
Ned George Forman*

APPENDIX

APPENDIX

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

NED GEORGE FORMAN, Petitioner-Appellant, vs.
CHARLES L. WOLFF, JR., et al., Respondent-Appellee.
No. 77-4030

[FILED November 20, 1978]

Appeal from the United States District Court
for the District of Nevada.

Before: DUNIWAY and CHOY, Circuit Judges, and
RENFREW*, District Judge

PER CURIAM:

Ned George Forman appeals from the federal district court's denial of habeas relief. We affirm.

I. Statement of the Case

On April 29, 1974, Forman pleaded guilty in Nevada state court to an information charging illegal sale of cocaine and received a sentence of fifteen years in Nevada state prison. Two years later the Nevada Supreme Court held that the statute under which Forman had been prosecuted required the prosecution to allege and prove the defendant's age as an essential element of the crime. *Hass v. State*, 92 Nev. 256, 548 P.2d 1367 (1976).

*The Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

Forman then filed a petition for habeas corpus in Nevada state district court, claiming that the state had failed to allege his age in its information. The state court ordered Forman's unconditional release. The state of Nevada appealed to the Nevada Supreme Court. Noting that it overruled *Hass* that very day in *State v. Wright*, 92 Nev. 734, 558 P.2d 1139 (1976), the Nevada Supreme Court reversed the granting of habeas relief. *Warden v. Forman*, 92 Nev. 739, 558 P.2d 1141 (1976). The state district court ordered Forman remanded to custody.

Forman then filed a petition for habeas corpus under 28 U.S.C. § 2254 in federal district court, claiming that his remand into custody violated the ex post facto and double jeopardy provisions of the United States Constitution. From the district court's denial of those claims Forman appeals.

II. Ex Post Facto Clause

The ex post facto clause limits the powers of the legislature and does not of its own force apply to the judicial branch. *Marks v. United States*, 430 U.S. 188, 191 (1977). Nonetheless, the courts have recognized that the principle of fair warning underlying the ex post facto clause limits the retroactive application of judicial decisions. *Marks*, 430 U.S. at 191; *Bouie v. Columbia*, 378 U.S. 347, 350-51 (1964). In *Bouie*, for example, the Supreme Court found that defendants had been denied due process when convicted under an unforeseeable interpretation of a state trespass statute which deprived them of "the fair warning to which the Constitution entitles" them. *Id.* at 354.

Forman, by contrast, has not been punished under an unforeseeable construction which prevents fair warning. In *Wright* the Nevada Supreme Court simply reinstated the law as it had been at the time Forman was arrested. Thus, at the time he performed the illegal act, Forman had adequate warning of the prohibited conduct as defined both at that time and after *Wright*. Indeed, at the time he did the illegal deed, the only construction of which Forman was not put on notice was that enunciated in the short-lived *Hass* decision.

III. Double Jeopardy

Our decision in *United States v. Rojas*, 554 F.2d 938 (9th Cir. 1977), belies appellant's double jeopardy contention. A jury had found Rojas guilty of the crime charged.¹ The court thereafter set aside the jury's verdict. We held that the Government could appeal the court's acquittal, noting:

[I]t is the possibility of a second trial, with its attendant "embarrassment, expense and ordeal" which the [double jeopardy] clause was designed to prevent. [Citations omitted.] This potential danger of a second trial is not present, however, in a situation such as this where the district court grants a post-trial motion for judgment of acquittal . . . and thereby sets aside the jury's verdict

¹In *Rojas* we noted that "[t]here of course is no question that jeopardy had 'attached' in this case at the time the jury was impaneled and sworn." 554 F.2d at 941 n. 3. We assume *arguendo* that jeopardy had attached when Forman entered his guilty plea. If it did not, Forman's double jeopardy interests would of course not be implicated. Compare *Bell v. Wainright*, 476 F.2d 964, 965 (5th Cir.), cert. denied 414 U.S. 1000 (1973) with *United States v. Jerry*, 487 F.2d 600, 606 (3rd Cir. 1973).

Appendix

4.

of guilty. In this situation, a successful government appeal will not result in the defendant's required subjection to a second trial, but rather will merely cause reinstatement of the jury's guilty verdict. Since no further fact-finding proceedings will be necessary upon reversal and remand, the defendant's double jeopardy interests are not implicated by the appeal.

Id. at 941 (footnotes omitted). Finding that the district judge had erred in granting the dismissal, we remanded to the district court to reinstate the jury's verdict. *Id.* at 944.

Here too there was a resolution of guilt followed by a determination that under applicable law defendant was not guilty. In both cases this latter determination was later reversed by a higher court. Thus *Rojas* compels the conclusion that the Nevada Supreme Court's reversal of the grant of habeas relief did not violate the double jeopardy protection of the United States Constitution.

AFFIRMED.

State of California)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

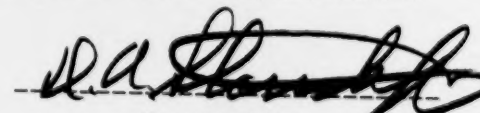
My business address is 326½ Main Street, Huntington Beach, California 92648, that on APRIL 6, 1979, I served the within PETITION FOR WRIT OF CERTIORARI (FORMAN vs. WOLFF) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Robert List, Attorney General
State of Nevada
Capitol Complex
Carson City, Nevada 89701
(2 copies)

Larry R. Hicks, District Attorney
Washoe County
Washoe County Courthouse
Reno, Nevada 89509
(2 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on APRIL 6, 1979, at HUNTINGTON BEACH, CALIFORNIA.


D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161